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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CALIFORNIA FIRST AMENDMENT
COALITION and SOCIETY OF
PROFESSIONAL JOURNALISTS,
NORTHERN CALIFORNIA CHAPTER,

No. C-96-1291-VRW

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Plaintiffs,

v.

JEANNE WOODFORD and CAL TERHUNE,

Defendants.

_____/

This matter came on for trial on February 14 and 16,
2000. The court now makes its findings of fact, draws conclusions
of law and directs preparation of a judgment as follows.

PARTIES AND CLAIMS

Plaintiffs are two non-profit organizations whose members

1 include print and broadcast journalists. Defendants are the warden
2 of San Quentin prison and the director of the California Department
3 of Corrections.

4 This action, filed on April 9, 1996, challenges the
5 procedure defendants have adopted concerning public access to
6 witness lethal injection executions. Plaintiffs allege that
7 defendants, in their official capacities, have restricted access to
8 view lethal injection executions in violation of the First
9 Amendment to the United States Constitution. Individual members of
10 plaintiff organizations have observed executions in the past as
11 part of their duties and some are likely to do so in the future.

12
13 **PROCEDURES 769 & 770 AND THEIR APPLICATION**

14 After California's resumption of the death penalty in
15 1978, two men were executed by defendants or their predecessors by
16 means of lethal gas: Robert Alton Harris was executed on April 21,
17 1992 and David Mason was executed on August 4, 1993. Subsequently,
18 California law was modified to permit the Department of Corrections
19 to execute condemned individuals by means of either lethal
20 injection or lethal gas. Cal Penal Code § 3604. By the time of
21 trial, five men had been executed in California by means of lethal
22 injection: William George Bonin was executed on February 23, 1996;
23 Keith Daniel Williams was executed on May 3, 1996; Thomas M
24 Thompson was executed on July 14, 1998; Jaturan Siripongs was
25 executed on February 9, 1999; and Manual Babbitt was executed on
26 May 4, 1999. After the conclusion of this trial, Darrell Keith
27 Rich was executed by lethal injection on March 15, 2000.

28 California Penal Code § 3605 requires the warden to

1 invite at least twelve witnesses to observe each execution.

2 Although the statute makes no mention of the media's presence, a
3 court order in this district prevents the warden from excluding the
4 media. See KQED, Inc v Vasquez, 1995 WL 489485 (ND Cal 1991).

5 Under procedures currently in place, seventeen media
6 representatives are invited to view executions from the rear of the
7 viewing area.

8 Executions by either means take place in the same chamber
9 in San Quentin. This chamber is equipped with a viewing area in
10 which witnesses stand to observe executions through a large glass
11 window. Members of the press stand in the rear of the chamber on
12 risers. There is a curtain running around the exterior of the
13 glass window. Defendants have adopted two procedures governing
14 public access to executions: Procedure 769, which governs
15 executions carried out by lethal gas, and Procedure 770, which
16 governs executions carried out by lethal injection. The difference
17 defendants have adopted for the extent of public access to witness
18 executions carried out by the two different procedures is at the
19 heart of this case.

20 At lethal gas executions conducted pursuant to
21 defendants' Procedure 769, the witnesses are present before the
22 condemned enters the chamber. The witnesses view prison staff
23 escorting the condemned into the chamber and watch as the condemned
24 is strapped to the execution chair. At a lethal injection
25 execution, on the other hand, the curtain concealing the execution
26 chamber is not opened until the condemned has already entered the
27 chamber, been strapped to the execution gurney and had intravenous
28 shunts inserted into both arms. See Plaintiffs' Exh 1 (Procedure

1 770). An announcement is read immediately before the lethal
2 compounds are administered to the condemned,

3 Pursuant to Procedure 770, when the witnesses entered the
4 chamber to view the Bonin execution, the curtain was drawn. Prison
5 officials did not open the curtain until after prison employees had
6 escorted Bonin to the chamber, secured him to the gurney and
7 inserted intravenous lines. When the curtain was opened, witnesses
8 observed Bonin lying motionless on the gurney. He appeared to some
9 to be asleep or sedated. Despite the requirements of Procedure
10 770, the witnesses were not informed when the lethal compounds
11 began to enter Bonin's body. The witnesses thus could not perceive
12 when this occurred. An announcement of Bonin's death was read to
13 the witnesses. During a press conference after the execution,
14 prison officials informed the media that there had been
15 difficulties inserting the intravenous lines into Bonin's arms.
16 Because defendants did not permit witnesses to view the execution
17 prior to the moment Bonin was fully secured to the gurney, these
18 difficulties occurred outside the presence of the witnesses.
19 Plaintiffs believed that Procedure 770's viewing limitations had
20 deprived them of observing a significant part of Bonin's execution
21 and brought this action.

22
23 **PRIOR PROCEEDINGS**

24 Plaintiffs seek to enjoin defendants from narrowing the
25 viewing period in lethal injection executions from that permitted
26 in lethal gas executions - that is, a view of the scene from the
27 time the condemned inmate enters the execution chamber.
28 Specifically, plaintiffs seek to enjoin defendants from "(1)

1 preventing witness observation of the entry, treatment, placement and restraint of the
2 prisoner in the execution chamber, the insertion of Ivs[sic], and the connection to the
3 execution apparatus to the prisoner; and (2) using a curtain or other obstructive device
4 to prevent the witnesses' observation." Complaint at 9-10. This court granted
5 plaintiffs' motion for a preliminary injunction and ultimately granted a permanent
6 injunction on summary judgment. California First Amendment Coalition v Calderon,
7 956 FSupp 883 (ND Cal 1997) ("Calderon I"). The court ordered defendants to allow
8 witnesses to "view the procedure at least from the point in time just prior to the
9 condemned being immobilized, that is strapped to the gurney or other apparatus of
10 death, until the point in time just after the prisoner dies." Id at 890. During the time
11 this court's injunction was in force, California executed Keith Williams without
12 incident.

13 Defendants appealed the court's order. Initially, the court of appeals reversed
14 and ordered judgment entered in favor of the defendants. California First Amendment
15 Coalition v Calderon, 138 F3d 1298 (9th Cir 1998). Subsequently, the court of
16 appeals withdrew this order and replaced it with a new order that instructs the court to
17 determine "whether the Coalition has presented 'substantial evidence' that Procedure
18 770 represents an exaggerated response to Calderon's security and safety concerns."
19 California First Amendment Coalition v Calderon, 150 F3d 976, 983 (9th Cir 1998)
20 ("Calderon III"), citing Pell v Procunier, 417 US 817, 827 (1974). Defendants filed a
21 renewed motion for summary judgment. The court denied this motion and proceeded
22 to trial to resolve the factual question presented by the appeals court. See January 21,
23 2000 order.

24 25 **FINDINGS OF FACT**

26 All executions in California take place shortly after midnight at San
27 Quentin. Reporter's Transcript (hereinafter "RT") 19,57. Pursuant to Procedure 770,
28 the condemned inmate is moved from his cell to the "overnight cell" near the execution

1 chamber at approximately 6:00 pm on the evening prior to the execution. During this
2 time period, the condemned has access to a telephone with which to call friends or
3 counsel. Defendants have no policy in place to prevent condemned inmates from
4 disclosing the identities of the execution staff during this time period.

5 Of the approximately 1000 correctional employees,
6 approximately 800 employees are potentially eligible to participate
7 as execution team members. RT 117-118. The 180-member death row
8 housing staff may not participate in the executions. RT 118. If
9 an employee has had prior contact with the condemned, this fact
10 does not disqualify that employee from serving on the execution
11 team for that condemned individual. RT 116.

12 Approximately twenty-five minutes prior to the scheduled
13 time of the execution, four execution team members place the
14 condemned in shackles and escort him to the execution chamber.
15 Approximately seven additional staff members are present in the
16 execution area while the four officers escort the inmate into the
17 chamber. RT 68. In the case of a lethal injection execution, the
18 condemned is then strapped to the gurney with six straps. RT 31,
19 63. Two medical personnel insert intravenous lines into the
20 condemned's arms. RT 31. A saline solution runs through the
21 intravenous lines until the administration of lethal compounds.
22 All staff then leave the chamber. At this point, the curtain
23 concealing the procedures from the witnesses is opened to allow
24 viewing and the lethal compounds begin to flow through the
25 intravenous lines. During the execution, approximately five to ten
26 staff members are present in the media observation room. No
27 attempt has been made to conceal the identities of these
28 individuals. RT 32.

1 During the Williams execution, while this court's
2 injunction was in effect, no attempt was made to conceal the
3 identities of the execution team members. RT 35. Although all
4 staff members were informed that they would be observed by the
5 witnesses and were afforded the opportunity to withdraw from the
6 execution team, none refused to participate in the execution. RT
7 34-35.

8 During the lethal gas executions, the witnesses were
9 present in the observation room and were able to watch prison staff
10 escort the condemned inmates into the chamber and restrain them.
11 Id at 84-85. No attempt was made to conceal the staff's
12 identities. Id. During the lethal gas execution of Robert Harris,
13 staff escorted Harris into the chamber, in view of the witnesses,
14 more than once. RT 85. This occurred because of stay orders
15 issued by the Ninth Circuit until the Supreme Court directed the
16 circuit court to desist issuing such orders.

17 The time period for preparing inmates for execution by
18 lethal injection has shortened with each execution. RT 122.
19 During the Babbitt execution, employees were in the chamber for
20 only six minutes. RT 122. Inserting intravenous lines into a
21 resisting patient is not appreciably more difficult than doing so
22 to a compliant patient, once the individual has been secured.
23 Inserting an intravenous line is generally accomplished within one
24 minute. RT 209.

25 At the Bonin execution, the viewers were not notified
26 when the administration of the lethal compounds began. During the
27 Williams execution, the curtain was not opened until Williams was
28 already strapped to the gurney. Although this appears to be more

1 limited viewing than the court's injunction contemplated, witnesses
2 perceived a dramatic contrast between viewing Bonin already
3 strapped down and outfitted with intravenous lines and viewing
4 Williams being prepared for execution by insertion of the
5 intravenous lines.

6 Defendants are concerned that media personnel viewing the
7 execution might regard any force that might be used to strap a
8 condemned inmate to the gurney as excessive force. RT 44-45. This
9 concern was a motivating factor in the drafting of Procedure 770.
10 San Quentin adopted a policy limiting face-to-face press interviews
11 with inmates around the same time that Procedure 770 was adopted.
12 Another policy limiting confidential communications with the media
13 was also adopted at this time.

14 In a memorandum written to the Department of Corrections
15 administration, then-Warden Arthur Calderon stated that one reason
16 defendants oppose the same degree of media access for lethal
17 injection executions as in executions by lethal gas is that

18 in the event of a hostile and combative inmate, it will
19 be necessary to use additional force and staff to subdue,
20 escort and secure the inmate to the gurney. It is
21 important that we are perceived as using only the minimal
22 amount of force necessary to accomplish the task. In
23 reality, it may take a great deal of force. This would
24 most certainly be misinterpreted by the media and inmate
25 invited witnesses who don't appreciate the situation we
26 are faced with.

27 Plaintiffs' Exh 3. In contrast to this concern, during the five
28 executions that Calderon has observed, the condemned inmate did not
29 resist. RT 58. Calderon believes that Procedure 770 authorizes
30 the warden to close the curtain during an execution in the event
31 there are difficulties with the implementation of the execution,
32 such as a "blown vein." RT 69.

1 The United States Military, the Federal Bureau of Prisons
2 and thirty-five states currently permit lethal injection as a means
3 of execution. Defendants' Exh P-1. The majority of these
4 jurisdictions follow a viewing procedure similar to Procedure 770.
5 Five of these jurisdictions have yet to adopt a policy for
6 witnesses. Three states permit witnesses to observe the placement
7 of the inmate on the gurney. These states then close the curtain
8 during the installation of the intravenous lines and re-open the
9 curtain after the staff have left the chamber. Two states restrict
10 viewing of the gurney placement and intravenous line installation
11 but have the staff remain present in the execution chamber once the
12 curtain is opened. One state, Oregon, is under court order to
13 require full witness access to the entire proceeding. Prior to the
14 court order, Oregon's viewing policy was similar to Procedure 770.
15 The parties were unable to locate any findings made by any
16 jurisdiction regarding the First Amendment rights of the press or
17 the public in connection with the adoption of procedures for
18 viewing lethal injection executions.

19 Ensuring staff safety is a legitimate safety concern.
20 Execution team members' identities have not in the past ever been
21 revealed by the media, nor have there been any acts of retaliation
22 or threats against any execution workers. Defendants presented no
23 evidence of any disclosures or attacks occurring in any other
24 jurisdiction. Defendants stipulate that the procedure employed in
25 lethal injection executions was not adopted in response to any past
26 incident of assault or threat against execution team members. See
27 July, 13, 1999 Stipulation. Although witnesses to all of San
28 Quentin's executions by lethal gas and to one by lethal injection

1 have been able to view members of the execution staff, no staff
2 member's identity has been disclosed in the media.

3 The problem of gangs at San Quentin and of a fatal attack
4 on a prison guard in 1985, while serious matters of prison security
5 in general, do not compel defendants to conceal the identities of
6 execution personnel. There was no evidence at trial that an inmate
7 would be more likely to attack a guard who participated in an
8 execution than a guard who had not participated in an execution.
9 Furthermore, there are many high-profile individuals whose
10 participation in the implementation of executions is essential,
11 including the warden, the governor and judges of the courts who
12 reject the condemned's appeals. No attempts are made to conceal
13 the identities of these people, their staff or other prison
14 personnel who have less direct roles in carrying out executions.

15 The use of surgical garb is available to defendants as an
16 alternative to limiting witness access in lethal injection
17 executions to an extent greater than that permitted in lethal gas
18 executions. Masks are an effective means of concealing the
19 identity of the wearer. It is increasingly common in the medical
20 community for any individual coming in contact with blood to wear
21 surgical masks and gloves. RT 206-07. The wearing of these items
22 is not yet universal, but is becoming mandatory at many medical
23 facilities as a means of protecting medical personnel from
24 infection. Masks and gloves do not impair the functioning of
25 medical personnel in the emergency room setting or their ability to
26 communicate with colleagues and patients. Use of surgical garb
27 would likewise not impede execution staff in performing executions.
28 Masks are unlikely to be dislodged during the execution process,

1 revealing the identity of the wearer.

2 Given the relatively short viewing time period involved,
3 the likelihood that the witnesses have had no prior contact with
4 the execution personnel and the fact that these personnel have
5 their backs turned to the witnesses for a large portion of the
6 proceedings, it is extremely unlikely that personnel wearing masks
7 would be identified.

8 The use of surgical garb is a practical alternative to
9 restricting access to witness lethal injection executions in order
10 to conceal the identity of executions staff should security
11 concerns warrant such concealment.

12 Plaintiffs have shown that restricting public access to
13 view lethal injection executions to a degree greater than that
14 afforded to view lethal gas executions is an exaggerated response
15 to defendants' safety concerns. Defendants' response is
16 exaggerated because (1) there have been no acts of violence or
17 threats of violence to prison personnel who have participated on
18 San Quentin execution teams; (2) defendants have available
19 alternative means of concealing the identities of execution team
20 members without restricting public access to view the entirety of a
21 lethal injection execution in the event the safety of execution
22 team members is threatened in the future; and (3) Procedure 770 was
23 motivated, at least in part, by a concern that the strapping of a
24 condemned inmate, the injection of intravenous lines or other
25 aspects of a lethal injection execution would be perceived as
26 brutal by the public and thus was, to that extent, prompted by
27 considerations other than legitimate concerns for prison personnel
28 safety.

DISCUSSION

Plaintiffs have met the burden imposed upon them by the ruling of the Ninth Circuit. Calderon III, 150 F3d at 983. On this basis, plaintiffs are entitled to the relief they seek. Other jurisdictions' adoption of similar viewing procedures does not undermine this conclusion. No jurisdiction has explicitly considered the First Amendment in formulating its viewing procedures. Because no balancing of interests was performed by policy makers in these jurisdictions, defendants cannot rely on their analogous procedures as evidence that Procedure 770 does not violate Pell.

Having determined that plaintiffs are entitled to judgment in their favor based on the Pell test cited in the remand order of the appeals court, the court finds three additional, independent grounds which support a result favorable to plaintiffs within the First Amendment, the Eighth Amendment and the California Penal Code.

With all due respect to the appeals court, the court reiterates its conclusion that the First Amendment compels at least some public access to execution proceedings. Plaintiffs have adduced copious evidence establishing the public nature of executions both in England and in the colonies at the time of the Bill of Rights. This evidence is not disputed by defendants. It is likewise uncontroverted that in California there has been an uninterrupted history of public or media presence at executions. See Calderon III, 150 F3d at 978.

The movement of executions from the public square to within prison walls in the nineteenth century coincided with the

1 advent of inexpensive, mass-circulation newspapers. Accounts from
2 this era establish that execution witnesses were present throughout
3 the entire proceedings. Indeed, until the advent of lethal
4 injection executions, witnesses were present prior to the
5 condemned's arrival at the location of the execution.

6 In finding a First Amendment right to view executions,
7 this court discussed both the tradition of public access to
8 executions and the "awesomeness of the state's imposition of death
9 as punishment." Calderon I, 956 FSupp at 886-890. The appeals
10 court rejected this court's reasoning, and stated that whether the
11 First Amendment is called into play is not based on the "notoriety"
12 of the underlying event. Calderon III, 150 F3d at 982. This court
13 is not alone in positing that the death penalty has a unique status
14 in the law. Numerous Supreme Court cases acknowledge the truism
15 that "death is different." See, e.g. Harmelin v Michigan, 501 US
16 957, 994 (1991); Turner v Murray, 476 US 28, 36-37 (1986); Eddings
17 v Oklahoma, 455 US 104 (1982); Beck v Alabama, 447 US 625 (1980).
18 It is not merely the fact that capital punishment is controversial
19 or notorious that makes it a unique act of the state. Whatever
20 one's personal views, there is no question that only in rare and
21 extreme circumstances does the law condone the government's
22 deliberate infliction of death.

23 The appeals court ruled that the press possesses no
24 heightened constitutional right to view the proceedings as compared
25 to the right of the general public. Calderon III, 150 F3d at 981
26 (quoting Pell). In doing so, the appeals court invoked a line of
27 cases limiting press access to activities within prison walls: Pell
28 (upholding regulation which limited media selection of specific

1 inmate for interview against separate challenges by prisoners and
2 media); Saxbe v Washington Post Co, 417 US 843 (1974) (upholding
3 regulation prohibiting face-to-face interviews with specific
4 inmates); Houchins v KOED, Inc, 438 US 1 (upholding policy of
5 allowing media to visit prison only during scheduled tours). The
6 appeals court rejected this court's analogy to cases recognizing
7 First Amendment rights in "access to certain government-controlled
8 sources of information related to the criminal justice system,"
9 such as preliminary hearings, voir dire and trials. See Calderon
10 I, 956 FSupp at 886 and cases cited therein. The appeals court
11 found that this court mistakenly determined that Procedure 770
12 implicated First Amendment access and accordingly had erred in
13 applying the First Amendment level of scrutiny in analyzing the
14 regulation. See Calderon III, 150 F3d at 982.

15 The appeals court did not find that any restriction of
16 witness access would be impervious to First Amendment challenge.
17 Rather, the appeals court found that the current procedure would
18 not violate the First Amendment, unless plaintiffs could show that
19 the procedure represents an exaggerated response to the risks
20 associated with public access to the execution process. The
21 appeals court noted that if the state "were to attempt a greater
22 limitation on the press' observation, we would have to revisit the
23 issue." Calderon III, 150 F3d at 982, n 10.

24 The appeals court asks this court to apply a test of
25 "substantial evidence" of an "exaggerated" response by prison
26 officials in deciding whether the First Amendment is implicated.
27 This test, however, comes from the section of the Pell decision
28 discussing the First Amendment rights of prison inmates, not those

1 of the media. Pell, 417 US at 827. The paragraph from which the
2 appeals court crafted this test concludes:

3 Courts cannot, of course, abdicate their constitutional
4 responsibility to delineate and protect fundamental
5 liberties. But when the issue involves a regulation
6 limiting one of several means of communication by an
7 inmate, the institutional objectives furthered by that
8 regulation and the measure of judicial deference owed to
9 corrections officials in their attempt to serve those
10 interests are relevant in gauging the validity of the
11 regulation.

12 Id (emphasis added).

13 Later in the Pell decision, the Court addressed the issue
14 of prison limitations on the media's access. The portion of Pell
15 which actually addresses the media's First Amendment rights in the
16 prison context also emphasizes the many opportunities for media
17 observation that the policy then under review afforded:

18 We note at the outset that this regulation is not part of
19 an attempt by the State to conceal the conditions in its
20 prisons or to frustrate the press' investigation and
21 reporting of those conditions. Indeed, the record
22 demonstrates that, under current corrections policy, both
23 the press and the general public are accorded full
24 opportunities to observe prison corrections.

25 Id at 830.

26 Plaintiffs have demonstrated that Procedure 770 violates
27 the spirit of the Pell decision. First, unlike the disputed policy
28 in Pell, Procedure 770 was adopted, at least in part, to prevent
the viewing of certain proceedings. Furthermore, defendants have a
history of resistance to media presence at executions, at one point
trying to prevent reporters from bringing pencils and paper into
the viewing chamber and even attempting to exclude the media's
presence altogether. See KOED v Vasquez, 1995 WL 489485 (ND Cal

1 1991).

2 More importantly, Procedure 770 provides no alternative
3 opportunities or channels for information about these events to
4 reach the media and the public. The condemned inmate, the only
5 non-government witness to any Eighth and Fourteenth Amendment
6 violations that might occur prior to the observation permitted by
7 Procedure 770, cannot communicate with the media or the public at
8 the conclusion of his execution.

9 Implicit in the appeals court's order is an
10 acknowledgment that the First Amendment touches the issues at bar.
11 Were there no possible implication of a First Amendment right,
12 remand of the action by that court would have been unnecessary.
13 Furthermore, the appeals court refused to hold that there could be
14 no First Amendment right implicated, stating instead that a
15 complete ban on viewing would likely prompt a different conclusion
16 from the one therein articulated. The Pell test that the appeals
17 court ordered for use in this remand proceeding is itself grounded
18 in the First Amendment. This court continues to believe,
19 therefore, that Richmond Newspapers v Virginia, 448 US 555 (1980),
20 rather than Pell, articulates more clearly the standard appropriate
21 for access to executions.

22 The court also believes that the Eighth Amendment or, at
23 any rate, the Eighth Amendment and the First Amendment, taken
24 together, mandate the public's presence during the entire
25 execution. A punishment satisfies the Constitution only if it is
26 compatible with "the evolving standards of decency which mark the
27 progress of a maturing society." See Trop v Dulles, 356 US 86, 101
28 (1958). Under this construct, methods of execution which cause

1 excessive pain are considered cruel and unusual. See In re
2 Kemmler, 136 US 436, 447 (1890). The public's perception of the
3 amount of suffering endured by the condemned and the duration of
4 the execution is necessary in determining whether a particular
5 execution protocol is acceptable under this evolutionary standard.

6 Courts evaluating the constitutionality of methods of
7 execution rely in part on eyewitness testimony. See e g Jones v
8 Butterworth, 695 So 2d 679 (Fla 1997); Sims v Florida 2000 WL
9 193226 at *7-8 (Fla 2000); Fierro v Gomez 865 FSupp 1387 (ND Cal
10 1994). This eyewitness testimony is crucial to the review of
11 execution protocols which the courts frequently undertake. While
12 courts rarely invalidate a state's execution procedure, ongoing
13 challenges and threats of challenge motivate states to modify their
14 procedures. For example, lethal gas and electrocution have been
15 vigorously challenged in recent years. In response to these
16 challenges, most states have either moved to the use of lethal
17 injection or make it available as an alternative to gas,
18 electrocution or hanging. See, e g, Bryan v Moore, 120 S Ct 1003
19 (2000) (certiorari to determine constitutionality of electrocution
20 dismissed as improvident after state modified statute to permit
21 execution by lethal injection); Rupe v Wood, 93 F3d 1434 (9th Cir
22 1996) (constitutionality of hanging a 400-pound man rendered moot
23 after state modified statute to permit lethal injection).

24 Although lethal injection is generally regarded as the
25 most humane and painless execution method presently available,
26 technology and society's perceptions may evolve in the future. If
27 there are serious difficulties in administering lethal injections,
28 society may cease to view it as an acceptable means of execution

1 and support a return to lethal gas or electrocution or push for
2 development of another execution method. Or a majority of the
3 public may decide that no method of execution is acceptable.
4 Eyewitness testimony is crucial to the public's evaluation of how
5 this extreme punishment is performed. See, e g Calderon III, 150
6 F3d at 978 ("Eyewitness media reports of the first lethal gas
7 executions sparked public debate over this form of execution and
8 the death penalty itself.") Demonstrating the need for witnesses
9 at executions is the fact that although there had only been five
10 executions by means of lethal injection in California by the time
11 of trial, the execution record of one of these individuals had
12 inexplicably vanished.

13 As a final matter, the court concludes that plaintiffs
14 are entitled to view the entire execution proceedings under
15 California law. As noted above, the warden is required by
16 California law to "invite the presence" of at least twelve
17 "reputable citizens" at each execution. Cal Penal Code § 3605.
18 Since executions in California were first moved within prison
19 walls, California has had a comparable statute requiring the
20 invitation of witnesses. Media representatives have been among the
21 witnesses present at every execution held within California's
22 prisons.

23 The Oregon Supreme Court recently addressed the question
24 whether its statute mandating the presence of witnesses at
25 executions also required that the witnesses be permitted to view
26 the condemned inmate entering the chamber and being prepared for
27 lethal injection. See Oregon Newspaper Publishers Association v
28 Oregon Department of Corrections, 988 P2d 359 (1999). Oregon's

1 execution witness statute is substantially similar to California's.
2 See Or Rev Stat § 137.473 (1998).

3 The Oregon Supreme Court held that the Oregon Department
4 of Corrections' rules which allowed for viewing only after the
5 prisoner had been secured to the gurney and outfitted with
6 intravenous shunts violated the state statute's mandate for viewing
7 the execution. Id at 364. The Oregon court accepted the argument
8 of the petitioners before it that "the statute requires that the
9 execution, not just the dying, be observed by the witnesses." Id.
10 The court found that the preliminary measures which the plaintiffs
11 in the instant case seek to view - the condemned prisoner entering
12 the chamber, his being physically restrained, the insertion of
13 intravenous shunts - are integral parts of the execution. Id. The
14 court contrasted these measures with "remote" pre-execution
15 procedures such as the condemned inmate's last meal. Id.

16 This court agrees with the Oregon court and adopts the
17 same reasoning in interpreting California's analogous statute.
18 Execution witnesses present by statute are entitled to view the
19 entire execution, not just "the dying." This encompasses observing
20 the condemned entering the chamber, his placement on the gurney and
21 the installation of the intravenous device. This amount of
22 viewing, although somewhat longer in duration, is comparable in
23 substance to what is permitted during a lethal gas execution. The
24 court is unpersuaded that the access afforded witnesses should vary
25 according to the execution method employed. Thus, the court finds
26 that section 3605 provides an independent basis for requiring the
27 defendants to extend the period of access to that requested by
28 plaintiffs.

CONCLUSIONS OF LAW

The court has jurisdiction over the subject matter of this action pursuant to 28 USC § 1983 in that plaintiffs allege that defendants have acted under the color of law in impinging the rights of plaintiffs and their members under the First Amendment. Defendants are found in this district and thus subject to the personal jurisdiction of the court.

The court concludes that defendants' practice of limiting witness observation during lethal injection executions is an exaggerated response to defendants' safety concerns. The court GRANTS judgment in favor of plaintiffs. Defendants are ENJOINED from preventing uninterrupted viewing of executions from the moment the condemned enters the execution chamber through to, and including, the time the condemned is declared dead.

Plaintiffs' counsel shall forthwith submit an appropriate form of judgment.

IT IS SO ORDERED.

VAUGHN R. WALKER
United States District Judge

United States District Court
For the Northern District of California

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